Supreme Court, U.S.
FILED
NOV 30 2010
OFFICE OF THE CLERK

No. 10-573

In the Supreme Court of the United States

SHEPHERD MONTESSORI CENTER MILAN,
a Michigan not for profit corporation,
Petitioner,

v.

ANN ARBOR CHARTER TOWNSHIP, ANN ARBOR CHARTER TOWNSHIP ZONING OFFICIAL, and ANN ARBOR CHARTER TOWNSHIP ZONING BOARD OF APPEALS,
Respondents.

On Petition for Writ of Certiorari to the Michigan Supreme Court

BRIEF IN OPPOSITION

JAMES J. WALSH
Counsel of Record
BODMAN LLP
201 SOUTH DIVISION STREET, SUITE 400
ANN ARBOR, MICHIGAN 48104
(734) 761-3780
jwalsh@bodmanllp.com

Counsel for Respondents

November 30, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REASONS FOR DENYING THE PETITION 1

CONCLUSION 3

TABLE OF AUTHORITIES

Cases

Central State University v. American Ass'n of University Professors, Central State University Chapter,
526 U.S. 124 (1999) 3

City of Cleburne v. Cleburne Living Center, Inc.,
473 U.S. 432 (1985) 2

Statutes

Revised School Code,
Mich. Comp. Laws 380.1 *et seq.* 2

Child Care Organization Act,
Mich. Comp. Laws 722.11 *et seq.* 2

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to rule as a matter of law that a local government when enacting and enforcing zoning restrictions cannot distinguish between preschool daycare facilities and elementary schools without violating the constitutional guarantee of equal protection. The equal protection clause cannot be stretched that far.

Petitioner overlooks the equal treatment it received when it sought the same zoning variance as Rainbow Rascals. The Michigan Supreme Court wrote:

> Historically, both Rainbow Rascals and plaintiff have operated daycare facilities, not primary schools. Rainbow Rascals originally operated its daycare facility for children of office park employees only. It requested a variance to expand the daycare operation to include children whose parents did not work in the office park. The township granted the variance. When Shepherd Montessori initially commenced its daycare operation, it was similarly limited to children of office park employees. Eventually, Shepherd Montessori made the same request as Rainbow Rascals: to expand operations to permit children whose parents were not office park employees to use the facility. The township granted this request, just as it had for Rainbow Rascals. Thus, when Rainbow Rascals and plaintiff made the same request, defendants treated the two entities the same and granted both requests.

486 Mich at 321-322.

Daycare facilities and primary schools are not the same. Michigan licenses and regulates daycare facilities through the Child Care Organization Act, Mich. Comp. Laws 722.11 *et seq*. The state Department of Human Services oversees the operation of daycare centers.

Michigan's Department of Education enforces the state's Revised School Code, Mich. Comp. Laws 380.1 *et seq*., which regulates public and private elementary and secondary schools.

The federal government also distinguishes preschool programs from elementary schools. Head Start programs that promote school readiness are under the Office of Head Start, part of the Department of Health and Human Services. Federal programs for elementary school are the responsibility of the Department of Education.

This case cannot be compared to *City of Cleburne v. Cleburne Living Center, Inc*, 473 U.S. 432 (1985). In *Cleburne*, the city carved out facilities housing groups of mentally retarded individuals from all other communal housing arrangements. The city's justifications for the mentally retarded exception could not satisfy even the minimal scrutiny of the rational basis test. Here, in contrast, petitioner argues that the Rainbow Rascals preschool daycare is similar to petitioner's elementary school because it "involves young children and a system of learning." Petition, p. 21. At that level of generality, similarity can always be asserted and vast amounts of government line-drawing could be challenged. The Court has summarily rejected as inconsistent with rational-basis review positions far less aggressive than the one

petitioner advances. *Central State University v. American Ass'n of University Professors, Central State University Chapter*, 526 U.S. 124 (1999).

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

James J. Walsh
Counsel of Record
Bodman LLP
201 South Division Street, Suite 400
Ann Arbor, Michigan 48104
(734) 761-3780
jwalsh@bodmanllp.com

Counsel for Respondents

November 30, 2010